Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1976
No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER: MICHAEL GLAZER: HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELLL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE

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Preliminary Statement

This brief is submitted by the City of New York as amicus curiae pursuant to Rule 42, subd. 4 of the Supreme Court Rules in support of the arguments advanced in this court by the petitioner.

Interest of the Amicus

Employees of the City of New York, the Board of Education of the City of New York and various other related entities are covered by five different statutorily created pension systems or plans. Each of these systems has features unique to itself, but uniformly each, like the pension plan in issue in this case, relies in part on sex differentiated actuarial tables in determining both the amount an employees must contribute to his or her pension plan and the benefits he or she will receive.

As of June 30, 1974, there were over 340,000 active members in these various pension systems and the systems were paying benefits to approximately 91,000 beneficiaries. See "Pensions: A Report of the Mayor's Advisory Board" (Richard R. Shinn, Chairman, April 1976) hereinafter "Shinn Report"), p. 39. The Shinn Report indicates that the cost to fund the City's pension obligations for the fiscal year commencing July 1, 1976 was at least 1.22 billion dollars, and perhaps as high as 1.428 billion dollars which figures constitute either 26.2% or 30.7% of the City's payroll (id., 13). An important element in funding these pension plans is the contributions made by the employees (id., 43). And, if such employees contributions should be ordered reduced by a court, the City would be required to make

up the difference necessary to fund the pension obligations, because under New York law (N.Y. Constitution, Art. V, §7) they are contractual obligations of the City and may not be reduced.

These various pensions systems have existed for many years and are funded based on widely accepted actuarial principles, including the recognized fact that women on the average outlive men. However, as occurred in the instant case, one of the City of New York's pension plans has recently been challenged as discriminatory against women employees based upon its reliance upon sex-differentiated actuarial tables in determining the contributions and benefits of men and women employees. Women in City Government United v. City of New York, S.D.N.Y., 75 Civ. 2868.

Should this court in the instant case adopt the view of the majority in the Court of Appeals for the Ninth Circuit, and should such holding control the determination of the suit presently pending against the City of New York, it is estimated that the City, already in dire financial straits, might be exposed to a possible liabililty in excess of 400 million dollars at an additional annual cost of 35 million dollars.*

Under these circumstances, we believe little more needs to be said as to the siginificance of this case to this amicus.

*These figures, which are tentative, but conservative, are based on estimates of required additional employer contributions and additional benefits to be paid present and future retirees.

ARGUMENT

We have read the petition for certiorari filed in this case and, based upon our examination of that document, feel confident that the petitioner's legal position, which we support, will be fully and forcefully presented to this court. Under such circumstances, we believe it would be an undue burden on this court for us to also brief the merits of this appeal. However, we would offer here some very brief observations which we believe are pertinent:

First, as compared to General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this is an a fortiori case for reversal, for here, unlike in that case, there is no denial to women of any type of benefit. Quite the contrary, the public employer has endeavored to treat its employees of both

sexes entirely alike in terms of compensation--providing women employees the same overall economic benefits as are provided to men, but recognizing, as is indisputable, the fact that women as a group live longer than men.

Second, we submit that had Congress in enacting Title VII intended to render illegal this very common feature of pension plans, it would have stated so more directly. This is not discrimination in hiring or firing. Nor, we believe, does it constitute discrimination in compensation. The claim of discrimination here is most strained, and certainly is not the type of "discrimination" which was of concern to Congress when it enacted Title VII, a view reinforced both by the language of the "Bennett Amendment and by its legislative history.

Third, insofar as EEOC regulations and interpretations of Title VII are concerned, we would suggest that this court in General Electric Co. v. Gilbert, supra, was unnecessarily restrained in its treatment of EEOC in this context. See 429 U.S. 125, at 140-145. We do not presume to critize EEOC for this, but that agency has by its own actions deprived itself of any credibility as a source to be consulted in attempting to ascertain the intent of Congress. Instead, and this may be to the good, it has consistently adopted the posture of an advocate, serving what it views as its client classes and attempting to push Title VII to its utmost limits without regard to what may have in fact been the intent of Congress.

CONCLUSION

An affirmance here would have dire consequences for the City of New York and, we are sure, numerous other pension systems. If this result must obtain in order to effect the will of Congress, then this must, of course, be so. However, we submit, this was clearly not the will of Congress and this court should not strain to find such an "intent." Rather, it should hold that pensions plans such as that here in issue are entirely lawful.

November 17, 1977

Respectfully submitted,

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